BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan	**)** **)** **)** **)** **)** **)**	**Case No. 14-1297-EL-SSO**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA APPLICATION FOR REHEARING OF THE OHIO CONSUMERS' COUNSEL AND NORTHWEST OHIO AGGREGATION COALITION

I. INTRODUCTION

The Application for Rehearing of the Commission's May 11, 2016 Entry on Rehearing ("Entry") filed by the Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition ("OCC/NOAC") fails to state valid grounds for rehearing. In the Entry, the Commission granted rehearing so that additional evidence could be taken on the Companies' proposed modifications to how Rider RRS is calculated (the "Proposal"). The Entry "allow[ed] parties to begin discovery" because the Proposal created "the potential for further evidentiary hearings."[1] Reopening the record to consider the merits of the Proposal was reasonable given that, as the Commission noted, approval of the Proposal would render moot three of the Companies' assignments of error.[2] Reopening the record also was lawful and consistent with R.C. 4903.10 and R.C. 4928.143. Thus, the Commission should deny OCC/NOAC's Application for Rehearing.

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[1] Entry, p. 3.

[2] Entry, p. 2 n.1.

II. ARGUMENT

A. The Entry Did Not Violate R.C. 4928.143.

OCC/NOAC argue in their first assignment of error that the Companies cannot alter their Stipulated ESP IV using the rehearing process but, instead, are bound by R.C. 4928.143(C)(1)(a) to withdraw Stipulated ESP IV, thereby terminating it.[3] OCC/NOAC made the same argument in their Request for Certification of Interlocutory Appeal filed on June 8, 2016. The argument is as frivolous here as it was there. R.C. 4928.143(C)(2) did not render inapplicable to all electric utilities the rehearing and appeal process in R.C. Chapter 4903. If this were the case, the Ohio Supreme Court would have rejected all utility appeals taken from Commission orders approving ESPs with modifications. But it has not.[4] While electric utilities "may withdraw the application, thereby terminating it," as provided in R.C. 4928.143(C)(2)(a), they also may seek rehearing of, and take an appeal from, any Commission modifications to an ESP. The Companies' right to seek rehearing of a Commission order, and the Commission's authority to grant rehearing, are expressly provided by statute.

OCC/NOAC accomplish nothing by mischaracterizing the Proposal as "fundamentally" altering and "drastically" departing from Stipulated ESP IV. The opposite is true. The aim of the Proposal is to maintain all the benefits for customers of Stipulated ESP IV, without reliance

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[3] OCC/NOAC AFR, pp. 4-5. OCC/NOAC also state in their assignment of error that the Entry violates R.C. 4928.141, but fail to provide any explanation in support of this statement. OCC/NOAC AFR, p. 4. Because R.C. 4928.141 simply requires that each electric distribution utility provide a standard service offer to customers, there is no reason to believe that the Entry violates R.C. 4928.141.

[4] *In re Columbus S. Power Co.*, 2016-Ohio-1608, ¶¶ 64-66 (considering AEP's cross-appeal and reversing Commission modification to AEP's second ESP); *In re Columbus S. Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958, 945 N.E.2d 501, ¶¶ 4-8, 18 (considering AEP's appeal from Second Entry on Rehearing in first ESP proceeding).

on a purchase power agreement ("PPA") or any other involvement of FirstEnergy Solutions Corp. ("FES").[5] The Companies are proposing modest modifications to the calculation of costs and revenues that will be reflected in Rider RRS so that Rider RRS "will continue to provide all the rate stabilization benefits recognized" in the Commission's March 31, 2016 Opinion and Order (the "Order").[6] The proposed modifications use "the same inputs to calculate Rider RRS that were relied upon by the Commission in approving Rider RRS in the Order."[7] Indeed, the Proposal is "tied more closely to the existing record in this case used by the Companies to project Rider RRS's $561 million net credit to customers."[8] Thus, rather than fundamentally altering or drastically departing from Stipulated ESP IV, the Proposal preserves Stipulated ESP IV.

OCC/NOAC also err in suggesting that a Federal Energy Regulatory Commission ("FERC") order issued on April 27, 2016 (the "FERC Order") "preempts" the Companies from accepting the Commission's modifications to Stipulated ESP IV (such as the mechanism limiting average customer bills).[9] This is wrong for several reasons. As an initial matter, FES retains the

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[5] *See* Rehearing Testimony of Eileen M. Mikkelsen ("Mikkelsen Rehearing Test."), pp. 4, 6 ("The Proposal will preserve the benefits of the Stipulated ESP IV for customers as previously determined by the Commission. . . . In addition, all other elements and benefits of the approved Stipulated ESP IV shall remain unchanged as previously approved by the Commission.").

[6] *Id.*, pp. 4, 5.

[7] *Id.*, p. 6.

[8] *Id.*, p. 4.

[9] OCC/NOAC AFR, p. 4. *See* Order, p. 86. OCC/NOAC describe this mechanism as a cap on Rider RRS (OCC/NOAC AFR, p. 4), which it is not. It is a cap on average customer bills. Order, p. 86. OCC/NOAC also provide the incorrect citation to the FERC Order, which was entered in FERC Docket No. EL16-34-000. *See* OCC/NOAC AFR, p. 3. OCC/NOAC also incorrectly state that the FERC "rescinded an earlier waiver given to FirstEnergy Corporation" (OCC/NOAC AFR, p. 3), when in fact the FERC Order rescinded a waiver given to FES specifically as to the PPA between the Companies and

option of submitting the PPA to the FERC for approval. However, on rehearing, the Companies have proposed an alternative – the Proposal – that would result in the Companies' customers receiving the benefits of Stipulated ESP IV without significant delay.[10] Moreover, while applications for rehearing of the Order are pending (both the Companies' application and those of intervenors), it is premature to consider whether the Companies will accept the Commission's modifications to Stipulated ESP IV. Nevertheless, the Companies note that they did not seek rehearing of the Commission's mechanism limiting average customer bills and are not seeking through the Proposal to avoid that modification to Stipulated ESP IV. Further, there is nothing in the FERC Order that precludes the Companies from accepting the Commission's modification of Stipulated ESP IV to add the mechanism limiting average customer bills if Rider RRS goes forward under the Proposal.

Because the Entry does not violate R.C. 4928.143 as claimed by OCC/NOAC, the Commission should deny their first assignment of error.

B. The Entry Did Not Violate R.C. 4903.10.

OCC/NOAC argue that the Commission's Entry should have limited the scope of rehearing to exclude any evidence regarding the Proposal because, according to OCC/NOAC, the Companies could have easily offered this evidence in the prior hearings.[11] OCC/NOAC rely on

(continued…)

FES. *EPSA v. FirstEnergy Solutions Corp.*, 155 FERC ¶61,101, FERC Docket No. EL-16-34-000, Order Granting Complaint ¶ 53 (April 27, 2016).

[10] *See* Mikkelsen Rehearing Test., p. 4 ("any subsequent proceeding at FERC to review the PPA would require a much more lengthy time period to come to conclusion").

[11] OCC/NOAC AFR, pp. 6-7.

R.C. 4903.10, which states in part: "The commission . . . shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing." This argument is contrary to fact and logic. There are three reasons why.

First, while the scope of the additional evidence to be taken is limited to the proposed changes to the Rider RRS calculation, OCC/NOAC have not identified even one piece of evidence that the Companies seek to introduce on rehearing that they could have offered in the original hearings conducted in 2015 and early 2016. Indeed, the application ignores the fact that, as explained in Company witness Mikkelsen's testimony, the Proposal relies on data included in the record and already relied upon by the Commission in its Order.[12] The costs, generation output and cleared capacity were offered and admitted into evidence in the prior hearings.[13]

Second, the concept of using existing inputs in the record to calculate modified Rider RRS could not have been offered in earlier hearings because it would not have been relevant. As shown in the Companies' Application for Rehearing, three events that occurred after the prior hearings combined to prompt the Companies to develop the alternative method for calculating Rider RRS credits or charges: (1) the Commission modified the Rider RRS calculation by imposing all capacity performance penalties on the Companies; (2) the Commission further modified the calculation related to plant outages; and (3) the FERC issued its order that complicated the Companies' and Commission's efforts to provide customers with the stability and other retail rate benefits provided by Stipulated ESP IV.[14] The Companies had no lawful

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[12] *See, e.g.*, Mikkelsen Rehearing Test., pp. 5-6.

[13] *Id. See* Company Ex. 25 (Lisowski Workpapers).

[14] Companies' Application for Rehearing, pp. 13-14 (May 2, 2016).

basis for introducing evidence in support of the Proposal prior to the Companies' application for rehearing. Thus, Ms. Mikkelsen's rehearing testimony supporting the Proposal could not have been offered, with reasonable diligence, in earlier hearings.

Third, OCC/NOAC argue in hindsight that the Companies should have presented evidence supporting the Proposal in the initial hearings because the Companies should have known a PPA approach was at risk.[15] The Companies are not required to be prescient. Further, there is no requirement in Ohio utility law or Commission procedure to simultaneously advance alternative proposals in an ESP proceeding. Such an approach in a proceeding already as complex as this would be entirely unwieldy and unrealistic. And OCC/NOAC's assumption that the Companies could have foreseen the outcome of the FERC Order lacks a sound legal basis. The Companies could not have anticipated that the FERC would expand its definition of "captive customers" in response to EPSA's complaint. Indeed, OCC/NOAC do not argue otherwise. Thus, the Companies lacked a reason to propose modifications to the Rider RRS calculation until after the Commission's Order and the FERC Order. As such, evidence in support of the Proposal could not, with reasonable diligence, have been offered in the original hearings.

C. The Commission Did Not Act Unreasonably In Granting Rehearing Before Considering Intervenors' Memoranda Contra.

OCC/NOAC's third assignment of error contends that the Commission needed to wait and consider intervenors' memoranda contra the Companies' Application for Rehearing before granting rehearing to take additional evidence on the Proposal.[16] There is no statutory support for this position. R.C. 4903.10 authorizes the Commission to grant rehearing, following the

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[15] OCC/NOAC AFR, p. 7.

[16] OCC/NOAC AFR, pp. 7-8.

filing of an application for rehearing, "if in its judgment sufficient reason therefor is made to appear." The only process requirement in the statute is notice, *i.e.*: (1) all parties must receive notice of the application for rehearing; and (2) all parties must receive notice of the Commission's rehearing.[17] The Commission provided OCC/NOAC all the process that was due under the law.

Remarkably, the only Ohio Supreme Court case cited by OCC/NOAC in their Application for Rehearing[18] is an example of the Commission granting rehearing only a few days after an application for rehearing had been filed under circumstances similar to those presented here. The Commission in that case approved an allowance for construction work in progress ("CWIP") for the Zimmer nuclear facility in an order issued November 5, 1982.[19] However, on November 12, 1982, the Nuclear Regulatory Commission ("NRC") issued an order that put into question the validity of the CWIP allowance. OCC filed an application for rehearing on November 15, 1982, which the Commission granted only two days later on November 17, 1982.[20] There is no evidence that OCC complained in that proceeding that the Commission moved too quickly to reconsider its earlier order. The Commission took additional evidence on CWIP and the impact of the NRC order in hearings that commenced on December 20, 1982 and

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[17] OCC/NOAC should be well aware that due process is defined by statute in Commission proceedings, and that no due process exists beyond that afforded by statute. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 20 ("We have repeatedly held that there is no constitutional right to notice and hearing in rate-related matters if no statutory right to a hearing exists.").

[18] *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12, 460 N.E.2d 1108 (1984).

[19] *Id.* at 12.

[20] *Id.*

concluded on January 21, 1983, and eventually removed the CWIP allowance from rate base.[21] OCC/NOAC have no basis for complaining here that the same efficiency and timeliness practiced by the Commission in this proceeding violated their rights.

Moreover, a Commission order is not subject to reversal absent a showing of prejudice by the party seeking reversal.[22] Here, OCC/NOAC cannot show that they were prejudiced by the Commission's decision to grant rehearing in the Entry. The Entry simply reopened the record so that the parties could be afforded additional process regarding the Proposal, and OCC/NOAC have been provided notice and a reasonable opportunity to be heard and has engaged in additional discovery as part of the rehearing process. The Commission remains free to consider the arguments raised in OCC/NOAC's Memorandum Contra Applications for Rehearing filed on May 12, 2016. Because OCC/NOAC were not prejudiced by the Commission's Entry, their Application for Rehearing should be denied.

III. CONCLUSION

OCC/NOAC have failed to show that the Entry was unreasonable or unlawful. Therefore, for the reasons stated above, the Commission should deny OCC/NOAC's Application for Rehearing.

Respectfully Submitted,

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[21] *Id.*

[22] *Myers v. Pub. Util. Comm.*, 64 Ohio St.3d 299, 302, 1992-Ohio-135, 595 N.E.2d 873.

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I certify that this Memorandum Contra was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 20th day of June, 2016. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. Further, a courtesy copy has been served upon parties via electronic mail.

/s/ James F. Lang
One of Attorneys for the Companies

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Summary: Memorandum Contra Application for Rehearing of the Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition. electronically filed by Mr. Nathaniel Trevor Alexander on behalf of Ohio Edison Company and The Cleveland Illuminating Company and The Toledo Edison Company